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SCIENTIFIC ASSISTANCE IN LAW MAKING

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There has been much criticism of American legislatures and of the character of laws which they annually produce, but until quite recently little or nothing has been done to remedy the conditions thus criticised. The criticism has been and still is largely destructive, not constructive. A view quite generally held is that we have entirely too much legislation and in order to remedy this, it has been urged that we should have less frequent sessions of the legislature and that these sessions should be limited as to time. An argument advanced against limiting the sessions, that should have considerable weight, however, is that such a limitation would make it practically impossible to secure well considered laws. A careful examination of the statutes of the several States would, no doubt, demonstrate the fact that a short session instead of decreasing the number of laws has actually been the cause of increasing them. The reason for this is that sufficient time is not given to discover the defects of and the objections to many bills which would otherwise be defeated, if time were given for investigation and consideration. Certainly an examination of the laws of Massachusetts, Wisconsin, Illinois and other States which have no limit on the length of the legislative session shows a smaller output of laws than is the case with many of the States which have limited the legislative session to sixty or ninety days.

Granting that there is justification for the criticism that there are too many laws which are either useless or harmful, it is nevertheless a remarkable fact that the legislative product of the several States, when taken as a whole, shows a decided progress and an unmistakable effort to make our laws fit the present economic and industrial conditions of the country. It is all the more remarkable when the difficulties under which the members of our legislatures have to work are taken into consideration. When it is borne in mind that a majority of our legislators have had no previous legislative experience and that they are required to pass upon anywhere from one to two thousand bills within a short session of sixty or ninety days and that no means are afforded them

to become acquainted with the facts necessary for the intelligent consideration of these bills, the general merit of the laws speaks well for the common sense of our people. The present method of legislation is purely haphazard and the surprising thing is that our legislation is as good as it is.

England no longer follows this old haphazard system of legislation. In 1869, there was created the office of parliamentary counsel and since that time this official has drafted practically all the bills introduced into Parliament for the Government. There has been a gradual improvement in the British statutes since that time, both as to the content and the form of laws. The official draftsman has not only made it possible to secure technical accuracy but greater clearness. By requiring all important bills to pass through his hands, the danger of having inconsistent and contradictory laws has been obviated, for it is one of his duties to compare any proposed measure with existing law.

No State in this country has an official similar to the parliamentary counsel, though there are a few cases where steps have been taken along this line. For example, in Connecticut, there is an official or clerk to whom every bill favorably acted upon by a committee must, before being reported to the legislature, be submitted for examination. This is the only case, I believe, where there is a statutory provision for compulsory reference in this country but this measure has not proved particularly beneficial from the fact that there is no continuity in office. Governor Baldwin, in a recent message to the legislature, called attention to this fact and urged that the present method of selecting the official for this position should be changed and that a man be selected on account of his qualifications for this work and not on account of his political affiliations and that the tenure be made permanent. New York provides for the appointment of draftsmen by the presiding officers of the legislature, it being the duty of these draftsmen to draft bills at the request of members of the committees. These officials are, no doubt, of great service to the inexperienced members of the legislature but the same objection applies here, since there is no continuity in the office nor do all bills have to be submitted to them.

During the past few years, however, there has been a new departure which has already been productive of good and gives promise of greater results in the future. This departure is the establishment of departments of legislative reference. The Wisconsin department has taken a wider scope than any of the others and has met with better results. It is, of course, realized by all students of legislation and legislative methods

that something more than technical accuracy is needed. It is of even greater importance that accurate and sound information should be secured on which to base our laws. It was to solve this problem that Dr. McCarthy conceived the idea of the work of the Wisconsin department of legislative reference and this idea has spread until over twenty States have established such departments and at the present time there are twelve or more similar departments established for cities.

The legislative reference bureaus, both for States and cities, have been in existence for a short time only but during this time, it has been clearly demonstrated that they serve a useful purpose. Only a few of them have been in a position to employ expert draftsmen to aid in the drafting of bills. The chief work of the bureaus has thus far been the collecting, compiling and collating of information on subjects of present or future legislation. These bureaus have, of course, not been able to secure all the information needed, since it is impossible to secure certain kinds of information which should be at the disposal of our legislative bodies. It does not seem possible with the present administrative machinery to collect accurate statistics as to the operation of many of our laws. It would be very desirable to have judicial statistics, both civil and criminal, but we shall probably have to depend on the census bureau or some other national agency to undertake this work. At present, the kind of information collected is confined principally to the laws of other States, court decisions, letters from experts and officials as to the operation of these laws, articles on economic and industrial questions, newspaper clippings, etc. When collected, this information is carefully indexed and frequently digests and compilations are prepared for the use of individuals and committees. In fact, there seems to be an opportunity for even greater usefulness on the part of these bureaus along this line. It is too much to expect members of the legislature, during a brief session, to find time to examine very many laws, treatises, etc., so that it is quite important that accurate and impartial digests and compilations be prepared containing the essential information as gathered from all the sources at hand.

For many years, private interests have been able to secure desired legislation, from the fact that they had gathered information bearing on such legislation and had been able to present it in such a form that the committees and members of the legislature who were without any information on the subject felt a hesitancy in refusing to pass the bills which the interests desired. The following quotation from Dr. McCarthy very aptly describes the situation:

If private forces maintain bureaus of information for representatives, let us have public information bureaus open to private and public interests alike. If it is difficult to get information because of the great variety of subjects now coming before our legislators, the only sensible thing to do is to have experts gather this material. If business interests have excellent lawyers to look after their legislation, the people should secure the same kind of men to help their representatives. If the business interests secure statisticians, engineers and scientific men, the public should do likewise. If great judges and lawyers are constantly working upon the problems of interpretation of laws, surely men of equal ability could well be consulted or retained as the people's representatives in the construction of these laws.¹

Sir Courtenay Ilbert, at one time parliamentary counsel, recognized the necessity of having information for the proper drafting of any bill. In this connection he says:

Before beginning to prepare a bill it is essential to master the subject-matter. Where a doubtful question of construction arises, the courts are entitled to consider the previous law and practice, the mischief or defects which the law was intended to remove, and the nature of the remedy proposed. So, before devising a remedy, it is needful to know the existing law and practice, and to have a clear conception of the mischief or defects for which the remedy is required.²

To secure the information needed for the content of the laws, it is necessary to have experts who know the kinds of information desired and how to secure it. It requires special study and special training to fit one for this kind of work. It is also very essential that the department be non-partisan and non-political and that there be permanency of tenure. A great advantage is gained by having permanency of tenure, for this makes it possible for the men in charge to become familiar with the subjects which come up for legislation and this enables them to prepare in advance for the sessions of the legislature.

After having secured the information on matters of proposed legislation, it is very essential that experts be employed to put the proposed measures in legal form. Much of the criticism of our courts is due to the fact that they have declared well meaning and often desirable laws unconstitutional on technicalities. Had proper care been taken in drafting the laws, the technical violations of the Constitution would have been removed. Many of the laws are frequently inconsistent and contradictory from the fact that it is the business of no one to call attention

¹ *The Wisconsin Idea*, p. 223.

² *Legislative Methods and Forms*, p. 242.

to the contradictions. With expert draftsmen connected with the legislative reference departments and with the requirement that before final passage all bills must be referred to them for final revision as to form, many of the present objections would be eliminated. It would not be necessary, of course, for the legislature to follow the report of the experts but it would make it impossible for the legislature to act blindly, as it so often does at present.

Some of the legislative reference bureaus are already in a position to aid the members of the legislature in the two ways mentioned above; namely, in securing information on which to base the laws and in having draftsmen to draft bills as requested. The Wisconsin department has done more along this line than any other and it seems worth while to give the rules which the department has in force.

RULES FOR THE DRAFTING ROOM

1. No bills will be drafted in the reference room. A separate drafting room and a separate force have been provided.

2. No bill will be drafted, nor amendments prepared, without *specific detailed written instructions* from a member of the legislature. Such instructions must bear the member's signature.

3. The draftsman can make no suggestions as to the contents of the bills. Our work is *merely clerical and technical*. We cannot furnish *ideas*.

4. We are not responsible for the *legality* or *constitutionality* of any measures. We are here to do *merely as directed*.

5. As this department cannot *introduce* bills or *modify* them after introduction, it is not responsible for the *rules* of the *legislature* or the *numbering* of sections either at the time of *introduction* or on the *final passage*.

In addition to the two ways in which scientific assistance is now being given to the legislatures of one or two of our States, Dr. R. H. Whitten, formerly at the head of the New York legislative reference department, has suggested a third way in which assistance might very profitably be given to members of the legislature. As this suggestion has not as yet been put into practice, it seems worth while to quote him on this point:

The scientific examination of each proposed measure by one or more men who have expert knowledge in relation to it. For the construction of a house we employ an architect; for the building of a bridge we employ an engineer, but for the drafting of an intricate and technical statute no expert knowledge is deemed essential. This is the height of stupidity. How can a Legislature or legislative committee pretend to consider and pass intelligently on these varied and difficult problems without securing

the carefully considered opinions of disinterested experts? Legislative committees should employ experts of all kinds—engineers, accountants, economists, physicians, actuaries, and in fact specialists of every class who are capable of disinterested scientific investigation. When, for example, a new problem in banking regulation comes up for consideration the sensible course would be for the committee after informing itself in a general way concerning the proposed measure to employ one or more disinterested banking experts to make a thorough investigation of the measure. They would take one month or six months to go over the proposition and consider it in all its phases. They would consider the practical effect of similar legislation in this or other lands. They would consider the probable effects of the regulation, direct and indirect, beneficial and otherwise. They would determine as near as possible how it would work in actual practice, what difficulties it would meet and what changes would be advisable in order to overcome the same. They would probably suggest a draft of a bill that would accomplish the intended result deftly and effectively and without the crudities, evils and unworkable features of the original bill.³

In order to make the assistance of the experts employed in collecting information and in drafting bills more effective, it has been suggested that the legislative session be divided into two parts;⁴ the first part to be devoted to the organization of the legislature, the appointment of committees and probably the introduction of bills. The legislature would then adjourn for—say a period of six months. During this period, the experts, as well as the committees, would have time in which to gather information and in which properly to prepare bills. During this period, provision could also be made for committee hearings, for at the present time little opportunity is given for hearings before the committees. On the reconvening of the legislature, the reports of the committees could be presented and time for debate given. In this way, bills would be passed during the second part of the session, after full time had been given for investigation and discussion. In 1911, California adopted a constitutional amendment providing for a recess of not less than thirty days after the legislature has been in session for a period of not more than thirty days. After the reassembling of the legislature, no bill can be introduced into either house without the consent of three-fourths of the members thereof, nor can any member introduce more than two bills during the second part of the session. It is too early to say what will be

³“The Spread of Legislation and the Need for Improved Legislative methods.” *Proceedings of the Association of Life Insurance Presidents for 1908*, p. 78.

⁴McCarthy, *The Wisconsin Idea*, p. 206, and Ernest Bruncken “Defective Methods of Legislation,” *The American Political Science Review*, May, 1909.

the effect of this amendment, as there has been but one session of the legislature since its adoption, but this departure will be watched with interest.

What has been said in regard to the need for scientific assistance in aiding the legislatures applies with equal force to the municipal legislative bodies. Recognizing this fact, there was established for the city of Baltimore in 1907 a department of legislative reference. Since that time, Milwaukee, Kansas City, St. Louis, Minneapolis, Chicago, New York, Philadelphia, Toronto, Cincinnati, Oakland and Portland, Oregon, have established municipal reference libraries. The indications are that quite a number of other cities will soon establish similar departments and that the national government itself perceives the need for establishing a central legislative and municipal reference bureau, which can be called upon by all the local departments for assistance in the collection and compilation of information.

After all, very much remains to be done, especially when the great mass of state and municipal legislation is taken into consideration. The outlook for the future, however, is most hopeful and the small beginnings of the Wisconsin department will, no doubt, soon develop along lines which will be helpful and useful.